No. 09-1520

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

REGINALD KEITH HAGEN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

NEAL KUMAR KATYAL
*Acting Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## TABLE OF CONTENTS

Page

A. The court of appeals' decision incorrectly constricts the scope of Section 922(g)(9) ..... 2
B. The conflict among the courts of appeals is ripe for resolution ..... 8
C. This Court's review is warranted ..... 10

## TABLE OF AUTHORITIES

Cases:

*Chrzanoski* v. *Ashcroft*, 327 F.3d 188 (2d Cir. 2003) ..... 5
*Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183 (2007) ..... 7, 8
*Johnson* v. *United States*, 130 S. Ct. 1265 (2010) .... 1, 4, 9
*Leocal* v. *Ashcroft*, 543 U.S. 1 (2004) ..... 1, 3
*Taylor* v. *United States*, 495 U.S. 575 (1990) ..... 7, 8
*United States* v. *Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004), cert. denied, 543 U.S. 1076 (2005) .... 6
*United States* v. *Nason*, 269 F.3d 10 (1st Cir. 2001) .... 8, 9
*United States* v. *Sampson*, 606 F.3d 505 (8th Cir. 2010) ..... 10
*United States* v. *Smith*, 171 F.3d 617 (8th Cir. 1999) ..... 5, 8, 9
*United States* v. *Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006), cert. denied, 549 U.S. 1245 (2007) .... 5
*United States* v. *White*, 606 F.3d 144 (4th Cir. 2010) ..... 9

Statutes and guidelines:

Armed Career Criminal Act of 1984, 18 U.S.C. 924(e):
18 U.S.C. 924(e)(2)(B)(i) ..... 4
18 U.S.C. 924(e)(2)(B)(ii) ..... 6, 8

Statutes and guidelines—Continued: Page

18 U.S.C. 16 ..... 4
18 U.S.C. 16(a) ..... 2, 3
18 U.S.C. 16(b) ..... 3
18 U.S.C. 373(a) ..... 7
18 U.S.C. 521(c)(2) ..... 7
18 U.S.C. 921(a)(33)(A) ..... 4, 6, 7
18 U.S.C. 921(a)(33)(A)(ii) ..... 1, 4, 5
18 U.S.C. 922(g)(1) ..... 6
18 U.S.C. 922(g)(9) ..... 1, 4, 8, 9, 10, 11
720 Ill. Comp. Stat. Ann. § 5/11-6(a) (West 2002) ..... 10
Tex. Penal Code Ann. (West 2003):
§ 1.07(a)(8) ..... 4
§ 22.01(a)(1) ..... 4, 7
United States Sentencing Guidelines § 4B1.2(a)(1) ..... 10

Miscellaneous:

Memorandum from C. Kevin Marshall, Deputy Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, *When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence"* (May 17, 2007), http://www.justice.gov/olc/2007/atfmcdv-opinion.pdf ..... 5
Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) ..... 6

# In the Supreme Court of the United States

No. 09-1520

UNITED STATES OF AMERICA, PETITIONER

*v.*

REGINALD KEITH HAGEN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

The Fifth Circuit in this case held that a person convicted of misdemeanor assault by intentionally and knowingly causing bodily injury to a family member has not been convicted of a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9), because, in the court's view, a bodily-injury assault can be committed without the "use * * * of physical force," 18 U.S.C. 921(a)(33)(A)(ii). That holding conflicts with decisions of the First and Eighth Circuits and will greatly impede enforcement of an important statute designed to keep firearms out of the hands of dangerous individuals.

Respondent argues that this Court should deny review because the Court's decisions in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), and *Johnson* v. *United States*, 130 S. Ct. 1265 (2010), may cause the two other courts of appeals that disagree with the Fifth Circuit to change their minds. But neither *Leocal* nor *Johnson* provides

any support for the decision below, and respondent's remaining arguments in defense of that decision lack merit. If allowed to stand, the decision will substantially undercut the uniform and effective enforcement of a law designed to provide a nationwide solution to a nationwide problem: the possession of firearms by those convicted of violent crimes against their families. This Court's review is warranted.

### A. The Court Of Appeals' Decision Incorrectly Constricts The Scope Of Section 922(g)(9)

The court of appeals' view that assaults that result in bodily injury do not categorically involve the "use * * * of physical force" conflicts with the ordinary usage of that phrase, as well as its more specialized usage to describe the common-law crime of battery. The court's decision, moreover, rests purely on hypothesized applications of a state criminal statute rather than concrete evidence of the manner in which state courts have applied the statute. Pet. 7-14. Respondent's efforts to defend the court of appeals' decision are unavailing and provide no basis for denying review.

1. At the outset, respondent contends (Br. in Opp. 4-5, 7-9) that further review is unwarranted because the decision below follows from this Court's decisions in *Leocal* and *Johnson*. Respondent's contention is incorrect.

a. In *Leocal*, this Court held that the crime of causing bodily injury while driving under the influence of alcohol (DUI) is not a "crime of violence" under 18 U.S.C. 16(a) because "[t]he key phrase in § 16(a) —the 'use . . . of physical force against the person or property of another'— most naturally suggests a higher degree of intent than negligent or merely accidental con-

duct." 543 U.S. at 9. The Court explained that, in context, the word "use" means "active employment," and "[w]hile one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident." *Ibid.*; see *ibid.* ("[A] person would 'use . . . physical force against' another when pushing him; however we would not ordinarily say a person 'use[s] . . . physical force against' another by stumbling and falling into him.") (second set of brackets in original).

For the same reason, the Court concluded that the DUI offense at issue was not a "crime of violence" under 18 U.S.C. 16(b), which covers felony offenses that "involve[] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Court explained that "[t]he 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct. The risk that an accident may occur when an individual drives while intoxicated is simply not the same thing as the risk that the individual may 'use' physical force against another in committing the DUI offense." *Leocal*, 543 U.S. at 10 n.7 (citations omitted). The Court thus concluded that Section 16(b), like Section 16(a), requires "a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 11.

This case, unlike *Leocal*, does not concern accidental or negligent causation of bodily injury. Respondent did not injure his family member by stumbling and falling into her; he was convicted of "*intentionally and knowingly* caus[ing] bodily injury" to his victim. Pet. App. 19a (emphasis added); see Pet. 7 n.3. Thus, even assum-

ing that *Leocal*'s reading of Section 16's definition of "crime of violence" applies equally to the definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A), but cf. *Johnson*, 130 S. Ct. at 1273, *Leocal*'s reading of Section 16's use-of-force language as excluding accidental or negligent conduct provides no support for the court of appeals' decision in this case.

b. Respondent's reliance on this Court's decision in *Johnson* (Br. in Opp. 5, 8-9) is similarly misplaced. In *Johnson*, this Court held that the term "physical force," as it appears in the first prong of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), means "*violent* force —that is, force capable of causing physical pain or injury to another person." *Johnson*, 130 S. Ct. at 1271. In so holding, the Court expressly reserved the question whether "physical force" has the same meaning in the context of the definition of "misdemeanor crime of domestic violence" for purposes of Section 922(g)(9). *Id.* at 1273. But in any event, as the government explained in its petition, see Pet. 12 n.4, the Texas assault offense at issue in this case does categorically involve "violent force" as this Court interpreted the term in *Johnson* because it requires proof that the defendant caused bodily injury. See Tex. Penal Code Ann. § 1.07(a)(8) (West 2003) (defining the term "[b]odily injury," as required by Texas Penal Code Ann. § 22.01(a)(1) (West 2003), to mean "physical pain, illness, or any impairment of physical condition").

2. Respondent argues (Br. in Opp. 9-14) that further review is unwarranted because the court of appeals' decision follows from Section 921(a)(33)(A)(ii)'s focus on the elements of predicate crimes, rather than the conduct underlying them. That argument rests on a funda-

mental misconception about the government's position. The government's argument is not that respondent has been convicted of a "misdemeanor crime of domestic violence" because, as a factual matter, he injured a family member by striking her with his hand. See *id.* at 10. The government's argument is, rather, that respondent has been convicted of a "misdemeanor crime of domestic violence" because, to convict him of bodily-injury assault, the prosecution was required to prove that he used physical force against his victim.[1]

Respondent does not explain how a defendant can intentionally and knowingly cause bodily injury without using physical force, other than to repeat the Fifth Circuit's examples of a defendant who "offer[s] the victim a poisoned drink or tell[s] the victim to back his car out into oncoming traffic," Br. in Opp. 10 (citing *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 879 (2006), cert. denied, 549 U.S. 1245 (2007)), and the Second Circuit's example of "a doctor who deliberately withholds vital medicine," *ibid.* (citing *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 196 (2003)). But as the petition explained (at 8-9), even in those hypothetical examples, the defendant has "use[d] * * * physical force" because he has actively employed physical force "to work according to his

[1] Contrary to respondent's contention (Br. in Opp. 11-12), that position is consistent with the Office of Legal Counsel memorandum on which respondent relies. See Memorandum from C. Kevin Marshall, Deputy Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, *When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence"* 3, 8-9 (May 17, 2007), http://www.justice.gov/olc/2007/atfmcdv-opinion.pdf (citing with approval the Eighth Circuit's decision in *United States* v. *Smith*, 171 F.3d 617, 620-621 (1999), which held, *inter alia*, that an assault offense involving an act intended to cause pain or injury to another has a use-of-force element within the meaning of Section 921(a)(33)(A)(ii)).

will" to cause injury to the victim. *United States* v. *Calderon-Pena*, 383 F.3d 254, 270 (5th Cir. 2004) (en banc) (Smith, J., dissenting), cert. denied, 543 U.S. 1076 (2005). Such offenses have long been understood to involve the "use of physical force" as that phrase has been employed to describe the common-law crime of battery. See Pet. 10-12; see also 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2(a) and (b), at 554-555 (2d ed. 2003). Respondent provides no answer to either point.

Respondent appears to acknowledge (Br. in Opp. 9 n.5) that the court of appeals' reading would have the absurd consequence of excluding offenses such as murder from the reach of the use-of-force language common to many federal crime-of-violence definitions. That is so because murder, like assault, is often defined as causing a particular result (*i.e.*, death), rather than by specifying the means used to accomplish the result, and often can be accomplished by indirect and subtle uses of force, as by poisoning. See Pet. 9-10.

Respondent argues that a felony murder conviction would still trigger a ban on firearms possession under the federal felon-in-possession statute, 18 U.S.C. 922(g)(1), and would qualify as a "violent felony" under the second prong of the ACCA definition, which reaches crimes involving conduct that "presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii). Br. in Opp. 9 n.5. But it makes little sense to posit that Congress intended the crime of murder to count as a "violent felony" because it presents a "potential risk" of injury. 18 U.S.C. 924(e)(2)(B)(ii). In any event, respondent fails to consider the effect of his anomalous interpretation of Section 921(a)(33)(A)'s use-of-force language on the many other crime-of-violence provisions that define covered offenses solely by refer-

ence to the use of physical force. See, *e.g.*, 18 U.S.C. 373(a) (prohibiting efforts to persuade a person to commit a federal felony "that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another"); 18 U.S.C. 521(c)(2) (providing a sentencing enhancement for criminal street gang members who in connection with the gang commit a "crime of violence that has as an element the use or attempted use of physical force against the person of another"); see also Pet. 10 (citing additional statutes). Respondent offers no reason to think Congress would have intended such provisions to exclude prototypically violent crimes such as murder, simply because murder in many States can be committed by subtle and indirect uses of force.

3. Even if Section 921(a)(33)(A) were read to exclude any assault crime capable of commission by indirect and subtle uses of force, respondent, like the court of appeals, identifies no evidence that Texas Penal Code § 22.01(a)(1) has been applied in that manner. Respondent insists (Br. in Opp. 13-14), however, that, contrary to this Court's guidance in *Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), he need not establish a "realistic probability" that the state statute would be so applied. *Id.* at 193. In respondent's view, *Duenas-Alvarez* applies only in determining whether a state crime counts as an enumerated offense under federal law (for example, "theft" or "burglary"), not in determining whether a state crime "has as an element" the use of physical force as required by a federal definition. See Br. in Opp. 13. There is, however, no relevant distinction between the two inquiries. As this Court made clear in *Taylor* v. *United States*, 495 U.S. 575 (1990), a state crime counts as an enumerated offense if it "has * * * all the *ele-*

*ments*" of the enumerated crime's generic definition. *Id.* at 599 (emphasis added); see *id.* at 598 (identifying the elements of generic "burglary" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B)(ii)); *Duenas-Alvarez*, 549 U.S. at 186-187 (discussing *Taylor*). This Court's guidance in *Duenas-Alvarez* is relevant to this case, and it suggests that the court of appeals erred in relying on nothing more than highly stylized hypothetical applications of the statute to hold that Texas bodily-injury assault on a family member is not a "misdemeanor crime of domestic violence" under Section 922(g)(9).

**B. The Conflict Among The Courts Of Appeals Is Ripe For Resolution**

Respondent does not dispute that the Fifth Circuit's decision in this case conflicts with decisions of the First and Eighth Circuits. See *United States* v. *Nason*, 269 F.3d 10, 20 (1st Cir. 2001); *United States* v. *Smith*, 171 F.3d 617, 620-621 (8th Cir. 1999). He argues, however, that review of that conflict would be premature because this Court's decisions in *Leocal* and *Johnson* may cause the First and Eighth Circuits to change their views. Respondent's argument lacks merit.

1. For the reasons explained above, see pp. 2-4, *supra*, neither *Leocal* nor *Johnson* provides any support for the court of appeals' decision in this case. Unlike *Leocal*, this case does not concern the accidental or negligent infliction of bodily injury. And unlike *Johnson*, it does not concern battery by touching another against his or her will. Rather, it concerns the offense of assault by intentionally and knowingly causing bodily injury to another. There is thus no reason to think that either *Leocal* or *Johnson* would prompt the First Circuit or the Eighth Circuit to reconsider the conclusion that misde-

meanor assault or battery offenses involving the infliction of bodily injury on a family member qualify as misdemeanor crimes of domestic violence under Section 922(g)(9).

2. Respondent errs in comparing this case to *United States* v. *White*, 606 F.3d 144, 151-153 (4th Cir. 2010), which relied on *Johnson* to disqualify common-law battery as a "misdemeanor crime of domestic violence" because the offense "may be accomplished with the slightest touch and no physical injury is required." *Id.* at 148, 153. Whether *Johnson* should be extended from the ACCA context to Section 922(g)(9) is an important question, which, in the government's view, the Fourth Circuit answered incorrectly. The propriety of that extension is not at issue here, however, because the Texas bodily-injury assault statute is not satisfied by "the slightest touch," but rather requires bodily injury. It thus requires proof of "violent force" as this Court interpreted the term in *Johnson*. See p. 4, *supra*.[2]

---

[2] Although respondent notes (Br. in Opp. 5) that the *White* court believed that *Johnson* resolved a conflict between the decisions in *Nason* and *Smith* and the decisions of other courts of appeals, the conflict in question is not the conflict at issue in this case. See *White*, 606 F.3d at 149-151. In addition to holding that bodily-injury assault and battery offenses qualify as "misdemeanor crimes of domestic violence," the courts in *Nason* and *Smith* also held that offensive-touching battery so qualifies. See *Nason*, 269 F.3d at 20; *Smith*, 171 F.3d at 621 n.2. As the Court in *White* noted, *Johnson* is relevant to the second question. See *White*, 606 F.3d at 151. It is not, however, relevant to the first question —that is, the question at issue in this case—except insofar as it tends to suggest that bodily-injury assault does involve the use of "*violent* force." See *Johnson*, 130 S. Ct. at 1271.

As noted in the petition (at 12 n.4), the government disagrees with *White*'s extension of *Johnson* to the Section 922(g)(9) context and filed a petition for rehearing. The rehearing petition has since been denied.

3. Respondent also errs (Br. in Opp. 6) in suggesting that the Eighth Circuit's decision in *United States* v. *Sampson*, 606 F.3d 505 (2010), demonstrates that the court is poised to reconsider its position on the question presented in light of *Johnson*. In *Sampson*, the Eighth Circuit noted that the government had not disputed that the Illinois offense of indecent solicitation of a child lacks a use-of-force element for purposes of the definition of "crime of violence" in Sentencing Guidelines § 4B1.2(a)(1), and the court observed that the conclusion was consistent with *Johnson*. 606 F.3d at 511. The indecent solicitation offense at issue in *Sampson* did not, however, require proof that the defendant intentionally or knowingly caused bodily injury. See 720 Ill. Comp. Stat. Ann. § 5/11-6(a) (West 2002). Respondent fails to explain how *Sampson*'s discussion of the indecent solicitation offense at issue there suggests that the Eighth Circuit may reconsider its view as to the assault offense at issue here.

**C. This Court's Review Is Warranted**

States across the country punish the intentional or knowing causation of bodily injury, without more, as misdemeanor assault or battery. If, as the court of appeals concluded, a conviction under such a statute in a domestic context is not a "misdemeanor crime of domestic violence," then Section 922(g)(9) will have no application to many persons convicted of misdemeanor domestic-violence crimes in much of the country. Pet. 16-17.

Respondent does not dispute that the court of appeals' reading of Section 922(g)(9) substantially under-

---

*White*, No. 09-4114 (4th Cir. June 29, 2010). This case, however, provides no occasion to consider the question presented in *White*.

mines Section 922(g)(9)'s effectiveness in keeping guns out of the hands of domestic abusers. He argues, however, that such a result does not merit the Court's attention because Section 922(g)(9) "is not the end-all and be-all for addressing this problem." Br. in Opp. 15. That other statutes might be enacted to address the problem provides no basis for declining to give a fair reading to the statute that Congress did enact or for declining to resolve a conflict of authority that threatens to undermine that statute's enforcement.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
*Acting Solicitor General*

JULY 2010